

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

KATHERINE MOUSSOURIS, HOLLY
MUENCHOW, and DANA PIERMARINI,
on behalf of themselves and a class of those
similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Case No. 2:15-cv-01483-JLR

**MOTION TO QUASH PLAINTIFFS'
REQUEST FOR INTERNAL
INVESTIGATION FILES AND
APPROVE USE OF A
CATEGORICAL PRIVILEGE LOG**

**NOTE ON MOTION CALENDAR:
JULY 18, 2016**

I. INTRODUCTION AND SUMMARY OF ISSUES PRESENTED

The present dispute involves two significant issues: (1) Plaintiffs’ request for highly confidential and substantially privileged investigation files of internal complaints of discrimination and (2) Plaintiffs’ demand for an itemized (rather than categorical) privilege log of attorney-client communications and work product regarding Microsoft’s gender-related diversity and compliance efforts. Microsoft proposed reasonable solutions that—consistent with the Federal Rules—strike the proper proportional balance: providing Plaintiffs with sufficient information to prepare their case and not overburdening Microsoft.

Microsoft has engaged in extensive good-faith negotiations with Plaintiffs regarding their extraordinarily broad discovery requests. The parties have held calls at least weekly to discuss various discovery issues, and the parties have made significant progress (e.g., reducing Plaintiffs’ original request for over 500 custodians to 61). However, Plaintiffs are still aiming to boil the ocean with discovery, disregarding the principles of proportionality and what is realistic under the Court’s order closing discovery in just over a month on August 12, 2016.

Microsoft has made exhaustive efforts to reach a reasonable resolution on the privilege disputes at issue here. With respect to the internal complaint investigation files, Microsoft has agreed to identify complaints made by putative class members since January 1, 2010 alleging gender discrimination and provide: (1) a log of lawsuits filed; (2) administrative charges filed; (3) demand letters sent to Microsoft; and (4) a log of internal complaints made by putative class members and investigated by Microsoft’s Employee Relations Investigation Team (“ERIT”), which is part of the Microsoft legal department. Given the six-year-plus period of time at issue in discovery and the breadth and diversity of the nationwide putative class, this is a significant undertaking. Plaintiffs now claim they are entitled to the *entire* investigation file for each complaint, notwithstanding the extent to which the files are privileged and the unduly burdensome review that Microsoft would have to undertake before production—burdens not warranted given the relative low probative value of the documents sought. Plaintiffs also insist on expanding the scope to include complaints of retaliation and “unfair treatment,” even though these are beyond the scope of Plaintiffs’ classwide allegations. Furthermore, Plaintiffs

1 seek to conduct broad searches of the custodial files of Microsoft ERIT investigators, which
 2 contain extensive privileged material. Plaintiffs refuse to acknowledge the burdens associated
 3 with these requests, and when Microsoft proffered a 30(b)(6) witness to testify on these issues
 4 and validate the extent of the privilege, Plaintiffs refused to appear for the deposition.

5 Microsoft has also attempted a reasonable agreement with Plaintiffs' counsel regarding
 6 its privilege logs. Plaintiffs' requests for documents regarding gender discrimination
 7 complaints and Microsoft's compliance with anti-discrimination laws go to the heart of the
 8 privileged work of Microsoft's in-house and outside attorneys. Plaintiffs' requests for these
 9 documents seek thousands of privileged materials involving dozens of attorneys—as well as
 10 employees and consultants working at the direction of attorneys. Plaintiffs' request that
 11 Microsoft collect, review, and log each one of these documents is unduly burdensome. Under
 12 these circumstances, a categorical privilege log is appropriate under the Federal Rules of Civil
 13 Procedure and the Western District of Washington proposed ESI protocol and Microsoft
 14 proposed such a log to Plaintiffs. Plaintiffs rejected this as well, again without justification.

15 Microsoft respectfully requests that the Court (1) deny Plaintiffs' request to expand the
 16 scope of what Microsoft has agreed to produce regarding complaints made by putative class
 17 members and custodial data of ERIT investigators and (2) approve Microsoft's use of a
 18 categorical log of attorney-client communications and documents created at the direction of
 19 counsel regarding gender-related diversity and compliance efforts.

20 **II. MICROSOFT ENGAGED IN EXTENSIVE GOOD FAITH NEGOTIATIONS**

21 From the outset, Microsoft has made every effort to meet and confer with Plaintiffs to
 22 produce relevant, proportionate, and reasonable discovery at this pre-certification stage of the
 23 case. To date, Microsoft has produced over 140,800 pages of documents (10.6 GB), which
 24 required review of over 7,800,000 (78 GBs), costing Microsoft over \$525,000 for review and
 25 production alone, not including the time invested by internal Microsoft staff or outside counsel
 26 fees. Declaration of Lauri A. Damrell ("Damrell Decl."), ¶ 2. The parties have also spent
 27 months negotiating the scope of custodian-level searches, which, based on Plaintiffs' latest
 28 iteration, would include a collection from over 60 custodians (negotiated down from Plaintiffs'

original request for over 500) and would involve an additional review of at least another 20,000,000 pages (200 GBs). *Id.* ¶ 3. In addition, Microsoft has spent hundreds of hours answering Plaintiffs’ questions on Microsoft’s databases, providing detailed declarations from IT personnel, presenting multiple witnesses at deposition, and retaining an outside data consultant to confirm Microsoft witness testimony on the burdens associated with Plaintiffs’ requests. *Id.* ¶ 4. Based on the parties’ discussions, Microsoft has agreed to produce nearly **200 separate personnel data fields** for over 66,000 employees dating back to January 1, 2010. *Id.* Beyond that (and relevant to the dispute here), Microsoft engaged in further meet and confer discussions regarding Plaintiffs’ RFP No. 21, which requests:

All DOCUMENTS (including but not limited to investigation files, logs, OR databases) that REFER OR RELATE TO internal requests, inquiries, demands, claims, grievances, concerns protests, OR complaints made by DEFENDANT’S applicants, employees, AND/OR managers against DEFENDANT, REFERRING OR RELATING TO unfair treatment against any woman, including gender discrimination, sexual harassment, pregnancy discrimination, hostile work environment, AND/OR retaliation, including investigations of such requests, inquiries, demands, claims, grievances, concerns, protests, AND/OR complaints. This document request includes all forms of COMMUNICATIONS—either in writing OR orally (where such COMMUNICATIONS have been taped, logged, noted AND/OR investigated and described through records of the investigation), formal OR informal, to DEFENDANT OR to any other party.

Id. ¶ 5. From the very beginning, Microsoft objected to this request to the extent it asks Microsoft to produce documents protected by attorney-client and attorney work product privileges. *Id.* ¶ 6. The volume of privileged documents implicated by this request is extensive. ERIT sits within Microsoft’s legal department, and Microsoft’s Employment Law Group (“ELG”) is typically involved in every ERIT investigation, to varying degrees, depending upon the specific investigation. *Id.* ¶ 7. In some cases, ELG attorneys designate the investigation as “attorney-directed” or “attorney-requested,” in which case the investigation is protected by the attorney-client privilege and/or attorney work-product doctrines, and thus, are not subject to production. *Id.* ¶ 8. An investigation may be designated as “attorney-directed” or “attorney-requested” at any stage of the investigation. *Id.* In addition, even when an investigation is not “attorney-directed” or “attorney-requested,” ERIT

1 investigators generally consult with ELG attorneys during an investigation on a variety of
2 issues and those privileged communications are often included in the investigation file. *Id.* ¶
3 9. Thus, determining whether any given document within an investigation file (which may be
4 hundreds of pages long) is protected by the attorney-client and/or work product privileges is an
5 extraordinarily time consuming process that requires a sophisticated legal review and
6 extensive quality control given the highly sensitive nature of the material. *Id.* ¶ 10.

7 To further complicate matters, investigators handle multiple matters and may
8 communicate with Microsoft counsel regarding multiple investigations in a single email. *Id.*
9 ¶ 11. Thus, an investigation file related to a putative class member's complaint may include
10 numerous documents related to employees and/or allegations wholly irrelevant to Plaintiffs'
11 claims. *Id.* Some files also include documents related to allegations that are outside the scope
12 of Plaintiffs' claims (e.g., allegations related to race, age, national origin), which Microsoft
13 would have to exclude or at least redact from the file. *Id.*

14 It is also difficult to isolate the putative class member's "complaint" within an
15 investigation file. In many cases, employees raise issues orally, so there is no written
16 "complaint" in the file. *Id.* ¶ 12. Nor do the files necessarily have a clean, non-privileged
17 summary of the complaint that can easily be pulled from the file. *Id.*

18 Given these serious concerns, Microsoft ultimately agreed to identify complaints made
19 by putative class members alleging gender discrimination (including pregnancy
20 discrimination) and sexual harassment, specifically: (1) A log of civil complaints, including the
21 case name, case number, jurisdiction, and case status (e.g. open or closed) filed from January
22 1, 2010 to present; (2) copies of EEOC and state agency charges filed from January 1, 2010 to
23 present; (3) copies of attorney demand letters sent to Microsoft on behalf of putative class
24 members from January 1, 2010 to present; and (4) a log of internal complaints investigated by
25 ERIT, including the complainant's unique identifier, job title, the basis for the complaint, the
26 year the complaint was received, and the outcome, from January 1, 2010 to present. *Id.* ¶ 13.

27 Plaintiffs' explanation of how they would be willing to narrow RFP No. 21 shifted
28 throughout the parties' discussions. *Id.* ¶¶ 15-25. Plaintiffs did not indicate that they wanted

1 “non-privileged internal complaints” until April 28, 2016, and when they did, they explained
2 that they simply wanted to “walk through exemplar complaints with the [30(b)(6)] witness.”

3 ¶ 16. Microsoft agreed to provide a proposal regarding privilege protection for internal
4 complaints but explained that without fully understanding Plaintiffs’ proposed class (which it
5 had not yet received), Microsoft could not properly identify in-scope complaints related to
6 any of the three categories of complaints and assess the discovery sought. *Id.* ¶ 18.

7 Plaintiffs did not clarify their proposed class definition until May 24, 2016. *Id.* ¶ 19.
8 Despite this delay and the ongoing dispute between the parties regarding the proper scope of
9 discovery, Microsoft agreed to produce a witness on June 28, 2016 for the 30(b)(6) deposition
10 that Plaintiffs noticed regarding on complaints and compliance. *Id.* ¶ 20. Based on Plaintiffs’
11 previous representation that they wanted to “walk through exemplar complaints” at the
12 deposition, Microsoft believed that its prior production of the non-privileged documents within
13 Moussouris’s and Piermarini’s complaint files provided Plaintiffs with the “exemplars” they
14 needed in advance of June 28 to allow them to prepare for the deposition. *Id.*

15 Immediately after Plaintiffs’ May 24, 2016 clarification of their class definition,
16 Microsoft began to reassess precisely what documents would fall within the categories of
17 complaints sought by Plaintiffs and the extent to which privilege applied to those documents.
18 *Id.* ¶ 21. On June 20, 2016, Microsoft communicated its final proposal, which Plaintiffs
19 swiftly rejected.¹ *Id.*

20 In a good faith attempt to keep the June 28 deposition on calendar, Microsoft contacted
21 Plaintiffs on June 21 to better understand what Plaintiffs believed they needed for the
22 deposition and to offer a sampling of investigation files in advance of the deposition. *Id.* ¶ 22.
23 The sampling would include non-privileged documents from three additional investigation files
24 for complaints made by employees in departments deemed “technical” by plaintiffs for

25 ¹ Plaintiffs claimed in their meet and confer correspondence that Microsoft “reversed course” regarding its
26 position on internal complaints. This is not true. Microsoft’s final proposal on June 20, 2016 was the result of
27 months-long meet and confer discussions, during which Plaintiffs continually expanded the scope of what they
28 were willing to accept. Though Plaintiffs’ requests were a moving target, the parties’ meet and confer
communications reflect that Microsoft’s position regarding discovery of privileged documents and information
remained consistent throughout. *Id.* ¶¶ 15-20.

1 purposes of discovery. *Id.* Since Microsoft already produced investigation files for Plaintiffs
 2 Moussouris (Technology and Research) and Piermarini (Sales and Marketing), this would
 3 round out the five departments that Plaintiffs included in their class definition. *Id.*

4 Plaintiffs also rejected this proposal. *Id.* ¶ 23. They expressed concern that Microsoft
 5 produced “only a handful” of documents related to the complaint investigation process, even
 6 though Microsoft confirmed that it produced all relevant, responsive, non-privileged materials
 7 regarding its investigative process. Plaintiffs then claimed that only a complete production of
 8 investigation files for all investigations would provide sufficient insight into how the process
 9 works, including what they believed would be instructions provided to investigators on how to
 10 conduct investigations. *Id.* Microsoft explained, however, that it had already produced two
 11 investigation files to Plaintiffs (for Piermarini and Moussouris) and neither file reflects such
 12 “instructions.” *Id.* ¶ 24. As Microsoft further explained, the additional investigation files,
 13 even if produced, would, likewise, not reflect investigation “instructions,” and the best way for
 14 Plaintiffs to gather additional information regarding how Microsoft generally conducts
 15 investigations is to depose its 30(b)(6) witness on these topics on June 28. *Id.* Plaintiffs
 16 rejected Microsoft’s proposal on June 22, 2016 and canceled the deposition. *Id.* ¶ 25.

17 In addition to seeking ERIT investigation files, Plaintiffs have requested that 25
 18 searches be run on custodial data for all ERIT investigators. This, too, is an extraordinarily
 19 broad request that would require collection and review of nearly 700,000 pages (7 GBs),
 20 including a large proportion of privileged documents. *Id.* ¶ 28. For similar reasons, Microsoft
 21 pushed back on having to undertake such an extensive review.

22 **III. PLAINTIFFS ARE NOT ENTITLED TO INTERNAL INVESTIGATION FILES**

23 **A. The Burden of Reviewing Microsoft’s Investigation Files are Extensive**

24 Once Plaintiffs clarified their proposed class and Microsoft began identifying,
 25 collecting, and reviewing the ERIT investigation files, it quickly became clear that reviewing
 26 all ERIT investigation files as well as custodian files from ERIT investigators for privilege
 27 will be unduly burdensome due to the volume and nature of the documents at issue.

28 Plaintiffs’ proposed class definition includes at least 11,625 putative class members

1 and this request encompasses any investigations of complaints lodged by these 11,625
 2 putative class members since January 1, 2010. *Id.* ¶ 26. Although a very small percentage of
 3 these putative class members ever made a complaint of gender discrimination or sexual
 4 harassment since January 2010 (and even fewer of these complaints were ultimately
 5 substantiated), the volume of documents is extensive because each investigation file can be
 6 hundreds of pages long. *Id.* ¶ 27. Moreover, the 25 searches Plaintiffs want performed on all
 7 ERIT custodial data could require a review of 700,000 pages (7 GBs). *Id.* ¶ 28. Based on
 8 Microsoft’s initial review of ERIT investigation files and ERIT custodial data, Microsoft
 9 estimates that it will cost over \$165,000 to collect, review, and log these documents. *Id.* ¶ 29.

10 **B. The Federal Rules and Case Law Support Microsoft’s Position.**

11 The scope of discovery is not without bounds. Revised Rule 26(b)(1) explains that
 12 discovery must be relevant to the claims and defenses *and* proportional to the needs of the
 13 case. Fed. R. Civ. P. 26(b)(1). Indeed, “[t]he parties and the court have a collective
 14 responsibility to consider the proportionality of all discovery and consider it in resolving
 15 disputes.” Fed. R. Civ. P. 26 advisory comm; *see also Gilead Sciences, Inc. v. Merck & Co.,*
 16 *Ins.*, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) (“a party seeking discovery of relevant,
 17 non-privileged information must show, before anything else, that the discovery sought is
 18 proportional to the needs of the case.”); *MP Nexlevel v. CVIN*, 2016 WL 1408459 (E.D. Cal.
 19 April 11, 2016) (finding additional discovery not required under FRCP 26(b)(1) where
 20 relevance was low and burden high); *Roberts v. Clark County Schools*, 312 F.R.D 594, 603 (D.
 21 Nev. 2016) (“The 2015 amendments to Rule 26(b)(1) emphasize the need to impose
 22 ‘reasonable limits on discovery through increased reliance on the common-sense concept of
 23 proportionality’” citing Chief Justice Roberts 2015 Year-End Report to the Federal Judiciary.);
 24 *O’Boyle v. Sweetapple*, 2016 WL 492655, at *3 (S.D. Fla. Feb. 8, 2016) (same).

25 That evidence “might yield helpful information” is not the applicable standard.” *Pertile*
 26 *v. GM*, 2016 WL 1059450 at*2 (D. Colo. March 17, 2016). In *Pertile*, plaintiff in a personal
 27 injury vehicle rollover case moved to compel production of proprietary vehicle design
 28 information. *Id.* at *1. The court explained that relevance is not the sole consideration when

1 addressing a motion to compel, rather, “this court must look at proportionality and, because of
2 the sensitivity of the issue, necessity.” *Id.* at *2. Denying the motion, the court held that “in
3 light of the production of documents and ESI already made...this court cannot conclude, at
4 this juncture, that access...[is] so central to the claims in dispute that their discovery must be
5 compelled.” *Id.* at *5. Ultimately, Rule 26(b)(1) was “intended to encourage judges to be
6 more aggressive in identifying and discouraging discovery overuse.” *Augustyniak v. Lowe’s*
7 *Home Ctr.*, 2016 WL 462346, at *5 (W.D.N.Y. Feb. 8, 2016).

8 Here, the burden of reviewing internal investigation files is disproportionate to any
9 possible benefit given what Microsoft has already produced and its proposed production. At
10 best, Plaintiffs have said they need this discovery to discuss exemplar complaints with
11 Microsoft’s 30(b)(6) witness. However, they could have accomplished this with the sample
12 that Microsoft proposed. Plaintiffs cannot show how discovery of entire investigation files
13 is relevant to their case and “likely to produce substantiation of class allegations.”

14 *Mantolette v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985). To meet their certification
15 burden, Plaintiffs must show that the alleged discriminatory practices are applied uniformly
16 across the class such that the issues to be determined—the injury and reason for the injury—
17 can be determined on a class-wide basis. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541,
18 2551 (2011). To that end, they must show that “a class of persons...have suffered the same
19 injury” and their claims are “typical of the class claims.” *Id.* at 2553. This Court has
20 already denied certification to a nationwide putative class of Microsoft employees alleging
21 discrimination in compensation, recognizing that it “is not possible to make a finding of
22 commonality where putative class involves extensive diversity in terms of geography, job
23 requirements, and/or managerial responsibilities.” *Donaldson v. Microsoft Corp.*, 205
24 F.R.D. 558, 567 (W.D. Wash. 2001) (citing cases). The largely unsubstantiated complaints
25 of a handful of putative class members are very unlikely to demonstrate that Plaintiffs’
26 claims are typical of others, and that the entire putative class of 11,625 diverse employees
27 have suffered the same injury. Microsoft has already agreed to disclose how many
28 complaints were substantiated after investigation by ERIT. Plaintiffs have not demonstrated

1 why they need the detailed investigation files. If anything, their insistence that they need
2 these individualized facts only underscores the importance of case-by-case adjudication.

3 Even if plaintiffs could show that pre-class certification discovery could substantiate
4 their class allegations, courts within this jurisdiction have limited that discovery to prevent
5 undue burden on defendants. *See, e.g., Kingsberry v. Chicago Title Ins. Co.*, 258 F.R.D.
6 668, 671 (W.D. Wash. 2009) (“[If] a case has not yet been certified as a class action, a
7 request to compel discovery on a putative class is overly broad and unduly burdensome
8 when ‘to comply, defendant would have to review an extremely large number of files in
9 search of the responsive documents.’”) (citation omitted).² Nor does the case law cited by
10 Plaintiffs in the parties’ meet and confer discussions support their demand for more
11 expansive discovery. In *Chen-Oster v. Goldman, Sachs & Co.*, 293 F.R.D. 557 (S.D.N.Y.
12 2013), the court granted plaintiffs’ motion to compel production of “internal complaints
13 regarding compensation, promotion, or performance review.” *Id.* at 564. But the *Chen-Oster*
14 court did not compel the production of entire investigation files that Plaintiffs seek here. *See*
15 *id.* at 564, 568; *see also Adams v. City of Montgomery*, 282 F.R.D. 627, 634 (M.D. Ala. 2012)
16 (denying motion to compel investigation file created by defendant following plaintiff’s
17 discrimination allegation). Even if it had, there is no evidence in that case to suggest that
18 Goldman Sachs had similar concerns to those identified by Microsoft.

19 **C. Plaintiffs Cannot Seek Discovery on Out-of-Scope Issues.**

20 Complaints on issues that go beyond the scope of the claims alleged by Plaintiffs in
21 this lawsuit are irrelevant, and Microsoft should not be required to produce them. *See, e.g.,*
22 *Walech v. Target Corp.*, No. C11-254 RAJ, 2012 WL 1068068, at *8 (W.D. Wash. Mar. 28,
23 2012) (limiting discovery to similar claims); *Moss v. Blue Cross & Blue Shield of Kan., Inc.*,
24 241 F.R.D. 683, 692 (D. Kan. 2007) (same); *Pleasants v. Allbaugh*, 208 F.R.D. 7, 15 (D.D.C.
25 2002) (“the proper scope of discovery seeking other complaints of discrimination against
26 defendant must be limited in time, type of action complained of or type of discrimination
27

28 ² In *Kingsberry*, after determining plaintiffs’ requests for insurance policies in several states was overly broad and unduly burdensome, the court limited discovery by requiring defendant to produce only a sampling of policies.

alleged”). Plaintiffs are not entitled to complaints regarding retaliation because Plaintiffs have not alleged class-wide retaliation. Moreover, if the complaint underlying the retaliation complaint is based on gender discrimination, sexual harassment, or pregnancy discrimination, they will be included in the complaints that Microsoft has agreed to include in its production.

Generic complaints of “unfair treatment” are also problematic because a search for such complaints would be extraordinarily burdensome and go well beyond the scope of this litigation. Such complaints could arise in various contexts, formally and informally, orally and in writing, with managers, HR, and possibly others. Microsoft does not centrally track these complaints because it would be nearly impossible to do so. A search of HR personnel alone would involve a review of over 1,000 custodians. Damrell Decl. ¶ 30. Undergoing the burden of tracking down complaints of “unfair treatment” is not warranted given their low probative value, and Plaintiffs have no legal support for such an overbroad search.

The discrimination and harassment complaints of putative class members that Microsoft has agreed to produce are more than broad enough to include any complaints that could possibly be relevant to this lawsuit. As Microsoft explained to Plaintiffs, ERIT undertakes investigations when an employee raises complaints related to potential policy violations regarding: (1) harassment or discrimination; (2) retaliation; (3) conflicts of interest related to family or romantic relationships; (4) equal employment opportunity; or (5) sexually explicit or offensive material. Damrell Decl. at 31. Complaints may fall within this scope regardless whether the complainant uses specific terms like “discrimination” or “harassment.” *Id.* Again, Plaintiffs could have explored this process further if it had proceeded with the 30(b)(6) deposition on June 28, but Plaintiffs’ canceled that deposition. For these reasons, Microsoft respectfully requests that this Court deny Plaintiffs’ request to expand discovery regarding complaints beyond what Microsoft has already agreed to produce.

IV. A CATEGORICAL PRIVILEGE LOG IS APPROPRIATE

Plaintiffs have propounded at least three Requests for Production (“RFPs”) that seek documents closely connected to Microsoft’s legal practices and seek extensive privileged material, including documents that refer or relate to: (1) Microsoft’s compliance efforts

1 pursuant to Title VII and state discrimination statutes (RFP 19); (2) Microsoft’s affirmative
 2 action, diversity, non-discrimination and/or equal employment opportunity policies,
 3 statements, guidelines, practices plans and/or training programs (RFP 20); and (3) internal
 4 requests, inquiries, demands, claims, grievances, concerns, protests or complaints made
 5 regarding “unfair treatment”³ (RFP 21). Damrell Decl. ¶ 5. Microsoft has agreed to produce
 6 thousands of pages of responsive, non-privileged documents for these requests, including, for
 7 example, Microsoft’s policies that it communicates to employees regarding equal employment
 8 opportunity, and the documents submitted to the U.S. Department of Labor, Office of Federal
 9 Compliance Programs (“OFCCP”). However, given the legal nature of these specific requests,
 10 the volume of attorney-client privileged communications and work performed at the direction
 11 of counsel is overwhelming. To ensure federal contractors comply with their the contractual
 12 promise of affirmative action and equal employment opportunity required of those who do
 13 business with the Federal government, OFCCP conducts thousands of evaluations a year based
 14 on a variety of neutral factors such as contract expiration date and contract value. See Federal
 15 Contractor Selection System (FCSS) - Questions and Answers, *available at*
 16 <https://www.dol.gov/ofccp/regs/compliance/faqs/fcssfaqs.htm>. Since OFCCP could knock on
 17 the door at any one of Microsoft’s dozens of offices across the country at any time,
 18 Microsoft—like many other respected federal contractors—engages in-house and outside
 19 counsel to ensure that it is prepared for that possibility.

20 A categorical log is appropriate under the Federal Rules of Civil Procedure and
 21 Western District of Washington proposed ESI procedures. The Committee Notes on the 1993
 22 amendments to Federal Rule 26 explicitly contemplate that a categorical log is appropriate
 23 when producing an item-by-item log would be unduly burdensome. Fed. R. Civ. P. 26(b)(5)
 24 advisory committee notes, 1993 amends. (“Details concerning time, persons, general subject
 25 matter, etc., may be appropriate if only a few items are withheld, but may be unduly
 26 burdensome when voluminous documents are claimed to be privileged or protected,

27
 28 ³ If the Court grants the relief Microsoft seeks above regarding complaints, a privilege log would not be necessary for that subset of documents, making this argument moot for that subset.

particularly if the items can be described by categories.”). Similarly, this Court’s Model Agreement Regarding Discovery of Electronically Stored Information (*available at* <http://www.wawd.uscourts.gov/sites/wawd/files/ModelESIAgreement.pdf>) suggests that a document-by-document log may not be appropriate in all cases. Courts have approved categorical logs when the burden of producing a log listing each individual document is too great, so long as the log contains enough information to allow the opposing party to evaluate the privilege claims. *See In re Phenylpropanolamine Prods. Liab. Litig.*, MDL No. 1407, 2002 U.S. Dist. LEXIS 26794 (W.D. Wash. Oct. 3, 2002)); *see also Schmidt v. Levi Strauss & Co.*, No. C04-01026 RMW (HRL), 2007 U.S. Dist. LEXIS 18787 (N.D. Cal. Feb. 28, 2007). Microsoft has therefore offered Plaintiffs the following categorical log:

Category	Description	Privilege Type
1	Correspondence between Microsoft attorneys and Microsoft employees regarding Microsoft’s gender- related diversity and compliance efforts from January 1, 2010 to present for purposes of obtaining legal advice.	Attorney-Client Communication; Work Product
2	Documents created at direction of counsel regarding Microsoft’s gender-related diversity and compliance efforts from January 1, 2010 to present.	Attorney-Client Communication; Work Product
3	Communications between Microsoft attorneys and outside counsel regarding Microsoft’s gender-related diversity and compliance efforts from January 1, 2010 to present for purposes of obtaining legal advice.	Attorney-Client Communication; Work Product

Again, Microsoft estimates that it will cost over \$165,000 to collect, review, redact, and log just the ERIT investigation files and custodial data. Damrell Decl. at 29. Individually logging all files potentially responsive to Plaintiffs’ RFP Nos. 19-21 would be exponentially greater. Significantly, because some of the documents are in paper format, Microsoft cannot create a metadata log for all files as contemplated under the ESI protocol. *See* Dkt. No. 50. Microsoft would have to create a document-by-document log for at least some of the files. Because of these burdens and because the privilege calls are adequately described above, a categorical log is appropriate.⁴

⁴ During the meet and confer discussions, Plaintiffs rejected the idea of a categorical log outright without referencing any particular category of documents that they believed should not be classified as “privileged.” Should Plaintiffs have concerns about a particular subset of documents, they should challenge that issue. Even if they raise such a challenge, Microsoft should not be required to collect, review, redact, and log the totality of all privileged files. Rather, the parties could meet and confer to identify a reasonable sample to review, redact and log. If Plaintiffs have concerns about the sample log, they can then challenge Microsoft’s designations.

1
2
3 Dated: July 7, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2016, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

DATED: July 7, 2016

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